(1) Supreme Court, U.S.
FILED

001270 FEB 5 2001

OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

CHRISTINE BERKLEY, individually and on behalf of all persons similarly situated,

Petitioner,

v.

H&R BLOCK EASTERN TAX SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

GORDON BALL
BANK OF AMERICA CENTER
550 West Main Avenue
Suite 750
Knoxville, Tennessee 37902
(865) 525-7028

PAT M. BARRETT, JR.
Counsel of Record
MARSHALL H. SMITH, JR.
BARRETT LAW OFFICE, P.A.
404 Court Square North
Post Office Box 987
Lexington, Mississippi 39095
(662) 834-2376

Attorneys for Petitioner

165056

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether the Tennessee Court of Appeals erred in its application of the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982), by ordering to arbitration the threshold question of the validity and enforceability of a contract clause mandating arbitration, thereby precluding judicial determination of the issue of arbitrability.

Whether the arbitration clause at issue impermissibly removes the "private attorney general" function of claimants under the Tennessee Consumer Protection Act of 1977 by putting into effect a prospective waiver of the right to pursue declaratory and injunctive relief under the statute.

Whether the substantive terms of the arbitration clause at issue in this case are procedurally and substantively unconscionable under applicable Tennessee law.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cited Authorities iv

Table of Appendices ix

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provisions 1

Statement of the Case 1

Reasons for Granting the Writ 9

I. The Tennessee Court Of Appeals Improperly Delegated To The Arbitrator The Issue Of The Arbitrability Of Petitioner's Statutory And Common-Law Claims 9

II. The Arbitration Clause At Issue In This Case Negates The Private Attorney General Function Of Claimants Under The TCPA .. 12

III. The Arbitration Clause At Issue In This Case Takes Away Virtually Any Practical Remedy And Is Substantively Unconscionable 16

Contents

Page

A. The Prohibitive Cost Of Arbitration Would Prevent Petitioner From Vindicating Her Claims 17

B. Petitioner Is Prohibited From Proceeding In A Class Suit 19

C. Petitioner's Right To A Trial By Jury Is Removed By The Arbitration Clause .. 20

Conclusion 21

TABLE OF CITED AUTHORITIES

Page

Cases:

Adkisson v. Harpeth Ford-Mercury, Inc., 1991 WL 17177 (Tenn. Ct. App., Feb. 15, 1991) 14, 20

Advantage Sales and Leasing Co. v. Townsend, No. 87-69-11, 1987 WL 16123 (Tenn. Ct. App., Aug. 28, 1987) 16, 19

Allstar Homes, Inc. v. Waters, 711 So.2d 924 (Ala. 1997) 21

AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643 (1986) 9, 11

Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962) 9

Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc., 521 S.W.2d 578 (Tenn. 1975) .. 10

Buraczynski v. Eyring, 919 S.W.2d 314 (Tenn. 1996) 16

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) 2

Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) 19

Cited Authorities

Page

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 10, 16

Frizzell Constr. Co. v. Gatlinburg, L.L.C., 9 S.W.3d 79 (Tenn. 1999) 7, 8

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 12, 15, 16

Green Tree v. Randolph, __ U.S. __, 121 S. Ct. 513 (2000) 17, 18, 19

Greenwich Marine, Inc. v. S.S. Alexandra, 225 F. Supp. 671 (S.D.N.Y. 1964)), *aff'd*, 339 F.2d 901 (2d Cir. 1965) 9

In re Knepp, 229 B.R. 821 (Bankr. N.D. Ala. 1999) 3

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) 9

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 3, 9, 10

Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382 (2d Cir. 1960), *cert. denied*, 368 U.S. 817 (1961) 9

Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614 (1985) 3, 9, 12, 13, 15

Cited Authorities

	Page
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)	20
Prudential Lines, Inc. v. Exxon Corp., 704 F.2d 59 (2d Cir. 1983)	3
Reconstruction Fin. Corp. v. Harrisons & Crosfield, Ltd., 204 F.2d 366 (2d Cir. 1953), *cert. denied*, 346 U.S. 854 (1953)	9
Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987)	13
Southerland Corp. v. Keating, 465 U.S. 1 (1984)	8
United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)	10
United States Constitution:	
Seventh Amendment	20, 21
Statutes:	
9 U.S.C. §§ 1-14 (1982)	i
9 U.S.C. §§ 1-16 (1982)	1
9 U.S.C. § 2	2, 11, 12, 16

Cited Authorities

	Page
9 U.S.C. § 3	2
9 U.S.C. § 4	2
9 U.S.C. § 9	2
15 U.S.C. § 1601 *et seq.*	17
28 U.S.C. § 1257(a)	1
29 U.S.C. § 185	9
Tennessee Consumer Protection Act of 1977, T.C.A. §§ 47-18-101 to 125	1
Tennessee Consumer Protection Act of 1977, T.C.A. § 47-18-109	19
1991 TENN. PUB. ACTS Ch. 468 § 3	19
Rule:	
Tennessee Rule of Civil Procedure 23	19

Cited Authorities

Page

Other Authorities:

Dunham, *The Arbitration Clause As Class Action Shield*, 16 Franchise Law Journal 141 (Spring 1997) 20

H.R. REP. NO. 96, 68th Cong., 1st Sess. 1-2 (1924) 1

Kaplinsky and Levin, *Banks Can Use Arbitration Clauses As a Defense to Class Actions*, 7 Business Law Today 24 (May/June 1998) 20

Sternlight, Jean R., *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U.L.Q. 637 (1996) 2, 3

Strickland, Henry C., *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385 (1992) 3

TABLE OF APPENDICES

Page

Appendix A — Opinion And Per Curiam Judgment Of The Court Of Appeals Of Tennessee At Knoxville Dated And Filed May 4, 2000 ..... 1a

Appendix B — Order Of The Circuit Court For Carter County At Elizabethton, Tennessee Dated June 21, 1999 And Filed June 23, 1999 ..... 11a

Appendix C — Per Curiam Order Of The Supreme Court Of Tennessee At Knoxville Denying Application For Permission To Appeal Dated And Filed November 6, 2000 ..... 15a

Appendix D — Relevant Statutes 16a

Appendix E — Excerpt From National Arbitration Forum – Code Of Procedure 26a

The Petitioner hereby petitions for a writ of certiorari to review the judgment of the Supreme Court of Tennessee in this case.

OPINIONS BELOW

The Order of the Court of Appeals of Tennessee reversing the decision of the trial court is reproduced as Appendix A to this Petition.

The Order of the Circuit Court of Carter County, Tennessee denying Respondent's motion to compel arbitration is reproduced as Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Order of the Supreme Court of Tennessee denying Petitioner's application for permission to appeal was entered on November 6, 2000. (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS

Relevant portions of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1982) ("FAA") and Tennessee Consumer Protection Act of 1977, T.C.A. §§ 47-18-101 to 125 ("TCPA"), are set forth in the Appendix at App., *infra*, 16a-25a.

STATEMENT OF THE CASE

The FAA was enacted in 1925 for the purpose of ameliorating the effects of years of judicial reluctance to enforce arbitration agreements between contracting parties. *See* H.R. REP. No. 96, 68th Cong., 1st Sess. 1-2 (1924). The FAA provides for enforcement of privately negotiated arbitration agreements and the placement of such agreements

"upon the same footing as other contracts, where [they] belong." *Id.; see also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985). The passage of the FAA marked a significant milestone in the emergence of arbitration in this country. Before the passage of the FAA, it was generally impossible for two merchants with equal bargaining power to enter a binding contract to resolve disputes arising on a contract through arbitration. *See* Sternlight, Jean R., *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U.L.Q. 637, 644 (1996). The FAA gave courts the power to enforce arbitration agreements by compelling arbitration, staying proceedings pending arbitration, and affirming arbitral awards. *See* 9 U.S.C. §§ 3, 4, 9. Since passage of the FAA, judicial hostility to arbitration has disappeared almost completely, and arbitration is considered by the judiciary to be a desirable form of dispute resolution.

Consistent with the FAA's stated goal of achieving parity between arbitration agreements and other contracts, the statute mandates that written provisions for arbitration of future disputes in commercial contracts or maritime transactions be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2. The FAA also sets forth procedures which courts are to follow in their implementation of the Act's substantive terms. Under Section 4 of the FAA, when weighing a question of whether a motion to compel arbitration shall be granted, courts must be satisfied that: (1) an arbitration agreement exists between the parties; (2) the dispute falls within the scope of the arbitration agreement (i.e., whether the dispute is arbitrable); and (3) the dispute does not involve the making of the agreement or the failure to comply therewith. *See* 9 U.S.C. § 4. Additionally, courts should consider whether there are

overriding public policy reasons for not referring the dispute to arbitration. *See Prudential Lines, Inc. v. Exxon Corp.*, 704 F.2d 59, 63 (2d Cir. 1983).

The FAA was intended to apply to consensual transactions between two merchants of roughly equal bargaining power, and not necessarily to transactions between a large merchant and a much weaker and less knowledgeable consumer.[1] Sternlight, *supra*, at 647. In 1925, the economy had few of the characteristics that are prevalent today. There were few transactions between large merchants and individual consumers that involved interstate commerce and thus fell under the FAA. *See* Strickland, Henry C., *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 389 (1992).[2]

---

1. The legislative history of the FAA reflects that the statute was never intended to apply to the type of consumer contracts of adhesion in which arbitration is now being enforced with increasing frequency. *See In re Knepp*, 229 B.R. 821, 839 n.5 (Bankr. N.D. Ala. 1999). Further, there is substantial evidence that the FAA was never intended to apply in state courts. *See id.* Instead of adhering to the legislative intent, however, the courts have drastically expanded the application and scope of the FAA. *See id.*

2. Recognizing this disparity, Justice Stevens has repeatedly urged that agreements between equals must be distinguished from those imposed by a stronger party upon a weaker party. For example, dissenting in *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 665 (1985), he urged that a car dealer should not be forced to resolve a claim against a large automobile manufacturer through arbitration. And in writing for the majority in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995), he emphasized that the consumers likely had no "idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right." He interpreted the agreement in favor of the consumer, to allow punitive damages, and against the brokerage house that drafted the agreement. *Id.*

This Petition for Certiorari arises from Petitioner Christine Berkley's arrangements with Respondent to aid her in preparing her federal income tax returns for the years 1994, 1995, 1996, and 1997. During these years, Berkley participated in Respondent's "Rapid Refund" program and accepted the invitation to apply for a Refund Anticipation Loan ("RAL") after being informed that this would expedite her tax refund. App, *infra*, at 2a. However, Berkley was not advised of Block's agreement with a lender whereby Block would receive an undisclosed payment – more commonly known as a "kickback" – from that lender if Berkley's RAL was approved. In 1997 Berkley signed a two-sided application for an RAL for the 1996 tax year which contained an arbitration clause in approximately eight-point type on the back page. The terms of the arbitration clause in the 1997 contract are as follows:

> **ARBITRATION:** The parties to this RAL application, the Loan Agreement on the RAL check that I signed and any such prior agreements involving the same parties (collectively the "Agreements") hereby agree that any claim or dispute (whether in contract, tort, or otherwise) in any way relating to the Agreements or relating to the relationships of such parties including the validity or enforceability of this arbitration provision or any part thereof (collectively the "Claim") shall be resolved, upon the election of either party, by arbitration pursuant to this arbitration provision and the Code of Procedure of the National Arbitration Forum in effect at the time the Claim is filed. No class actions are permitted without the consent of the parties. The parties agree that for purposes of this arbitration provision, H & R Block, Inc., its subsidiaries, franchisees, affiliates, agents, and

employees (collectively "Block") shall be an intended third party beneficiary of the Agreements and a party to this arbitration provision and any claims or disputes in any way relating to Block in connection with any RAL transaction made pursuant to the Agreements involving Block shall be considered a Claim and resolved pursuant to this arbitration provision. Rules and forms of the National Arbitration Forum may be obtained by calling (800) 474-2371 and all Claims shall be filed by certified mail at any National Arbitration office or at Post Office Box 50191, Minneapolis, Minnesota 55405. Any participatory arbitration hearing that I attend will take place in the federal judicial district in which I live. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16. The award of the arbitrator shall apply reasoned findings of fact and conclusions of law, and shall not be subject to appeal. Judgment upon the award may be entered in any court having jurisdiction. Nothing in this arbitration provision shall be construed to prevent BNB's use of offset or other contractual rights involving my income tax refund or other amount or deposit with BNB to pay off any RAL debts now or hereafter owed by me to BNB or any other RAL Lender or ERO pursuant to the Agreements. The parties hereto acknowledge that they have a right to litigate claims in court, but they prefer to resolve any such claims through arbitration and hereby waive their rights to litigate such claims in court upon election of arbitration by either party. The parties further agree that any Claim hereunder shall be limited to no more than the claimant's actual compensatory, economic

> damages plus punitive damages, if any in the Arbitrator's discretion, of no more than 3 times the claimant's respective actual compensatory, economic damages or $50,000.00, whichever is lesser, and that each party shall bear the expense of their respective attorney's fees regardless of which party prevails.

See App., *infra*, 3a-5a.

The only signature line on the RAL application for the consumer is on the front side of the application, while the arbitration clause in rendered in fine print on the other side of the document. For obvious reasons, it is extremely unlikely that the average consumer will examine the arbitration clause at all. In this case, Berkley was unaware of the arbitration clause and was not informed of its existence. The clause is written in small, approximately eight-point type, single-spaced, and with no paragraph indentations. Respondent did not inform Berkley that her signature upon the proffered application waived her right to seek redress in a court of law, her right to a jury trial, her right to conduct class litigation, and her right to avail herself in a court of law of the provisions of the TCPA. Respondent also failed to inform Petitioner of the costs of arbitration which, under the guidelines of the agency designated by Respondent to conduct the arbitration, the National Arbitration Forum, would require at least $3,250 to conduct a basic arbitration proceeding involving filing the claim, issuing subpoenas, conducting discovery, and conducting a two-day hearing. *See* App., *infra*, at 26a-37a. Respondent simply informed her that if she wished to receive her tax refund in an expedited fashion, she should fill out the RAL application. In short, Respondent failed to disclose the full cost of arbitration or that the signing of the RAL application takes away virtually any practical remedy for consumers.

Upon discovering the terms of the "Rapid Refund" program and that Respondent had not sufficiently disclosed such terms, Petitioner filed a complaint on her behalf and on behalf of a class of similarly situated persons which alleged violation of the TCPA, breach of the duty of good faith and fair dealing; unjust enrichment; and breach of the principal-agency relationship. The complaint asserted claims for monetary claims in an amount up to $74,000, but expressly disclaimed recovery greater than $74,000 per individual member of the proposed Class.

In March, 1998, the Respondent[3] filed a series of motions, relying upon the 1997 execution of the RAL application to argue that the trial court should compel arbitration and dismiss Petitioner's claims at law. Respondent further submitted that the FAA required the trial court to apply the arbitration agreement signed in 1997 to the documents executed between Petitioner and Respondents in 1994, 1995, and 1996. On April 12, 1999, after hearing arguments from the parties, the Circuit Court for Carter County, Tennessee refused to compel arbitration or dismiss Plaintiff's Complaint. *See* App., *infra*, at 11a-13a.

Respondent filed an interlocutory appeal on the issue. On May 4, 2000, the Tennessee Court of Appeals reversed the trial court's denial of Respondent's motion to compel arbitration of Petitioner's claims, and further held that the issue of whether the dispute should be arbitrated should itself be submitted to arbitration. *See* App., *infra*., at 8a-9a. In so holding, the Tennessee Court of Appeals reasoned (1) the Supreme Court of Tennessee has held that the FAA is applicable in the courts of Tennessee, *Frizzell Constr.*

---

3. The original complaint included three entities as defendants – H & R Block, Inc., H & R Block Eastern Tax Services, and Block Financial Corp. H & R Block, Inc. and Block Financial Corp. were dismissed by the trial court for lack of personal jurisdiction.

Co. v. Gatlinburg, L.L.C., 9 S.W.3d 79 (Tenn. 1999), (2) the FAA, as interpreted in *Southerland Corp. v. Keating*, 465 U.S. 1 (1984), withdraws the power of states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration, and (3) because the arbitration clause at in this case requires the question of arbitrability to itself be submitted to arbitration, the court would not decide the issue of the arbitrability of Petitioner's claims, but allow an arbitrator to decide the issue. *See* App., *infra*, 1a-10a.

Petitioner filed a Petition for Rehearing in the Tennessee Court of Appeals. The Petition was denied. Petitioner filed an application to appeal the ruling in the Supreme Court of Tennessee. The application was denied on November 6, 2000. *See* App., *infra*, at 15a. Thus, the Supreme Court of Tennessee refused to address issues set forth by the Petitioner involving (1) whether Respondent should be allowed to manipulate the terms of the FAA in a way which denies Tennessee claimants the substantive relief provided by the TCPA and (2) whether the purported contract at issue in this case is an unconscionable adhesion contract void *ab initio*. By essentially ignoring Petitioner's substantive claims, the Supreme Court of Tennessee has advanced the general judicial policy favoring arbitration to an insupportable extreme and misinterpreted the mechanisms put into place by the FAA. Important, dispositive issues in this case, including the issue of whether the claims must be arbitrated at all, have been removed from the judicial forum and relegated to the arbitrator's table. This decision should not be allowed to stand.

REASONS FOR GRANTING THE WRIT

I. THE TENNESSEE COURT OF APPEALS IMPROPERLY DELEGATED TO THE ARBITRATOR THE ISSUE OF THE ARBITRABILITY OF PETITIONER'S STATUTORY AND COMMON-LAW CLAIMS

Arbitration under the FAA is a matter of consent, not coercion. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). To further this general principle, this Court has explicitly and unanimously reserved the question of whether a party has agreed to arbitrate claims for the courts to decide. *See Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962). Although generally applied in the context of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, the principle that courts are to determine arbitrability has been applied routinely in proceedings under the FAA.[4] The first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* Inc., 473 U.S. 614, 621 (1985). Thus, the issue of agreement is for judicial determination unless the parties clearly and unmistakably provide otherwise. *See AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986). "[T]he question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.*[5] This approach works to ensure that the FAA's pro-arbitration

4. *See, e.g., Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 385 (2d Cir. 1960), *cert. denied*, 368 U.S. 817 (1961); *Greenwich Marine, Inc. v. S.S. Alexandra*, 225 F. Supp. 671, 676 (S.D.N.Y. 1964)), *aff'd*, 339 F.2d 901 (2d Cir. 1965); *Reconstruction Fin. Corp. v. Harrisons & Crosfield, Ltd.*, 204 F.2d 366, 368 (2d Cir. 1953), *cert. denied*, 346 U.S. 854 (1953).

5. *See also John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964) ("under our decisions, whether or not the company

(Cont'd)

policy does not operate without regard to the wishes of the parties. *See Mastrobuono*, 514 U.S. at 57 (1995).

When deciding whether the parties agreed to arbitrate a certain matter, courts generally should apply ordinary state-law principles that govern the formation of contracts. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Under Tennessee law, the "cardinal rule [in interpreting contracts] . . . is to ascertain the intention of the parties and to give effect to that intention, consistent with legal principles." *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975). Throughout the course of this litigation, Petitioner has maintained that she did not agree to arbitrate disputes arising from her business dealings with Respondents, that no valid agreement to arbitrate was ever formed, and that she did not intend to waive any of her substantive rights. In short, Petitioner maintains that there was no real agreement to arbitrate. Under the FAA, the decisions of this Court construing its terms, and Tennessee contract principles as set forth in *Pearsall Motors, supra*, the Tennessee Court of Appeals was required to examine whether a valid agreement to arbitrate was formed. Inexplicably, the court did not do so. *See* App., *infra*, at 1a to 10a. To date, despite the fact that the FAA governs this issue and clearly requires a judicial ruling on the issue of arbitrability, Petitioner has had no success in her attempts to have the question of arbitrability examined in the Tennessee appellate system.

(Cont'd)
was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties"); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960) ("the judicial inquiry . . . must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made.")

Instead of analyzing the question of whether an agreement to arbitrate existed between the parties, the Tennessee Court of Appeals held that the arbitrator, not the court, should determine the "validity or enforceability of the arbitration agreement," and that "the parties must submit the question of arbitration to arbitration" App., *infra*, at 9a. In reaching this conclusion, the court relied upon language in the arbitration clause of Respondent's RAL application stating that the parties "hereby agree that any claim or dispute. . .in any way relating to the Agreements or relating to the relationships of such parties including the validity or enforceability of this arbitration provision or any part thereof. . . shall be resolved . . . by binding arbitration." App., *infra*, at 3a. The court assumed agreement between the parties without examining or addressing the question of the parties' intent as required by both the FAA and applicable Tennessee contract law and took the language of the arbitration clause in the RAL application as the starting-point for its analysis. By relying solely upon this contract language and assuming that the contract itself embodied a valid agreement, the courts below ignored their responsibility to determine whether the parties actually reached agreement to form a valid arbitration agreement. The courts below did not address the question of whether there existed clear and unmistakable evidence that the parties agreed to submit the threshold issue of arbitrability to arbitration, as required by this Court's holding in *AT&T Technologies*, 475 U.S. at 649 (1986).

The fundamental issue of who – a court or an arbitrator – determines the issue of arbitrability requires this Court's attention. If in this case the arbitrator decides the issue of arbitrability, the net effect to Petitioner will be a denial of judicial scrutiny of the legal question of whether her actions manifested intent to arbitrate. Petitioner does not dispute the fact that a strong pro-arbitration presumption is present in the FAA. However, Section 2 of the FAA explicitly provides

for revocation of an arbitration clause in a contract "upon such grounds as exist in law or equity for the revocation of any contract." 9 U.S.C. § 2. As illustrated in the foregoing, this Court has consistently held that courts, not arbitrators, must decide whether the revocation provision of 9 U.S.C. § 2 may work to invalidate particular arbitration clauses. The courts below acted in direct contravention of this Court's consistent instruction, and their actions create Tennessee precedent comprehensively closing the courthouse doors to all claimants who have signed contracts containing arbitration clauses. Accordingly, the Court should grant certiorari to determine whether the actions of the Tennessee Court of Appeals and Supreme Court of Tennessee were contrary to this Court's clear precedent.

II. THE ARBITRATION CLAUSE AT ISSUE IN THIS CASE NEGATES THE PRIVATE ATTORNEY GENERAL FUNCTION OF CLAIMANTS UNDER THE TCPA

This Court has made clear that arbitration may resolve statutory as well as purely contractual claims if the parties so intend. In doing so, parties do not forego substantive rights, but merely agree to resolve them in a different forum. *See, e.g., Mitsubishi Motors, supra*, 473 U.S. at 627. Notwithstanding this fact, "not . . . all controversies implicating statutory rights are suitable for arbitration." *Id.* "The unsuitability of a statutory claim for arbitration turns on Congressional intent, which can be discovered in the text of the statute in question, its legislative history or in an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Although the Court has not elaborated on the meaning of the phrase "inherent conflict" between particular statutes and the arbitral forum, two cases shed light on its meaning.

In *Mitsubishi Motors, supra*, 473 U.S. 614, the related question was whether statutory antitrust claims are subject to arbitration in the context of enforcement of an international agreement. The Court stated:

> The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators . . . Notwithstanding its important incidental policing function, the treble-damages cause of action conferred on private parties by § 4 of the Clayton Act, 15 U.S.C. § 15, . . . seeks primarily to enable an injured competitor to gain compensation for that injury.

Mitsubishi Motors, 473 U.S. at 635-636.

Thus, because the remedy provided by the Clayton Act measures damages by multiples of the injury actually proved and makes remedies available only to parties actually injured, factors which emphasized the individual nature of the remedy, the Court rejected the Second Circuit's conclusion that the dispute in *Mitsubishi Motors* was not subject to international arbitration because the private attorney general purpose of the Clayton Act would be subverted. *Id.* Similarly, in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 241-42 (1987), the Court stated "[T]he private attorney general role for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff, and does not support a finding that there is an irreconcilable conflict between arbitration and enforcement of the RICO statute."

The *Mitsubishi Motors* and *McMahon* Courts' rejection of what may be termed the "public interest" argument relies upon the essentially private nature of the damages remedy at issue. The public benefits of the antitrust and civil RICO

suit is merely incidental to the pursuit of a private remedy, making the "private attorney general" role for such plaintiffs relatively implausible. The above passages suggest, however, that when an important purpose and effect of a statute is to enjoin conduct injurious to the general public, *i.e.*, when the plaintiff is acting authentically as a private attorney general, such a remedy may be inherently incompatible with arbitration.

The TCPA contains provisions for declaratory and injunctive relief which give the statute an authentic private attorney general function. The statute permits the court to enter a declaratory judgment that "the act or practice violates the provisions of this part and to enjoin the person who has violated, is violating, or who is otherwise likely to violate this part . . ." App., *infra*, at 21a. In her case against Respondents, Petitioner seeks to invoke this provision of the statute, and therefore acts on behalf of the public as a private attorney general to enjoin future deceptive practices. *See Adkinson v. Harpeth Ford-Mercury, Inc.*, 1991 WL 17177 (Tenn. Ct. App. 1991). However, under the arbitration agreement in this case, Petitioner is not able to exercise this role, as the agreement limits damages to "no more than the claimant's actual compensatory, economic damages plus punitive damages, if any in the Arbitrator's discretion, of no more than 3 times the claimant's respective actual compensatory, economic damages or $50,000.00." Under these circumstances, arbitration is not a suitable forum. By the terms of the arbitration agreement, the declaratory and injunctive relief which might be awarded in this case if the court were to find Respondents' conduct unfair or deceptive is beyond the arbitrator's power to grant. The purpose of the declaratory and injunctive relief provisions of the TCPA is not to resolve a private dispute, but to remedy a public wrong. The benefits of granting this relief do not accrue primarily to the individual claimant, but to the general public in danger of being victimized by the same deceptive conduct as the

claimant suffered. In this important respect, the declaratory and injunctive relief at issue in this case differs from the antitrust treble damages remedy considered in *Mitsubishi Motors, supra*, 473 U.S. at 635-36, in which any public benefit was merely incidental to private compensation.

In *Gilmer*, the Court also suggests that in determining whether a statutory provision is suitable for arbitration, the intent of the enacting legislative body and the text of the applicable statute determine if statutory rights are suitable for arbitration. *See Gilmer, supra*, 500 U.S. at 26. The TCPA contains an unequivocal declaration that "[N]o provision of this part [the TCPA] may be limited or waived by contract, or otherwise, notwithstanding any other provision of law to the contrary . . ." App., *infra*, at 24a. By limiting the remedies available to claimants to economic damages, the arbitration agreement in this case constitutes a limit upon the rights available to consumers under the TCPA. This limiting function is explicitly disallowed by the terms of the statute, making Petitioner's statutory claims unsuitable for submission to arbitration.

By seeking the benefit of the declaratory and injunctive relief provisions of the TCPA, Petitioner acts as a private attorney general. Mandatory arbitration of Petitioner's claims removes her ability to act individually for the benefit of numerous Tennessee consumers who have been or may be harmed in the future by the conduct of Petitioners. More significantly, the decisions of the Tennessee courts in this case create authority precluding any party in Petitioner's situation from attempting to enforce the private attorney general provisions of the TCPA. This precedent works to the manifest detriment of Tennessee consumers and is in inherent conflict with the purpose of the TCPA. The existence of this inherent conflict between mandatory arbitration and the remedial purposes of specific statutes was predicted by this

Court in *Gilmer*, *supra*, 500 U.S. at 26 (1991). Accordingly, this Court, faced squarely with the situation it predicted, should grant certiorari and reverse the decision of the Supreme Court of Tennessee.

III. THE ARBITRATION CLAUSE AT ISSUE IN THIS CASE TAKES AWAY VIRTUALLY ANY PRACTICAL REMEDY AND IS SUBSTANTIVELY UNCONSCIONABLE

The FAA does not require enforcement of an arbitration agreement if grounds at law or equity exist for the revocation of the contract. *See* 9 U.S.C. § 2. In determining whether grounds for revocation exist, courts generally should apply ordinary state-law principles that govern the formation of contracts. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) Under Tennessee law, enforceability of a contract "generally depends upon whether the terms of the contract are beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable." *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn. 1996). Courts will not enforce adhesion contracts which are oppressive to the weaker party or which serve to limit the obligations on liability of the stronger party. *Id.* A party seeking to avoid performing obligations under a contract on the ground of unconscionability will be allowed to do so "only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." *Advantage Sales and Leasing Co. v. Townsend*, No. 87-69-11, 1987 WL 16123, *2 (Tenn. Ct. App., Aug. 28, 1987). Petitioner submits that such unconscionability is present in this case, and the arbitration agreement at issue should not be enforced.

A. THE PROHIBITIVE COST OF ARBITRATION WOULD PREVENT PETITIONER FROM VINDICATING HER CLAIMS

In *Green Tree v. Randolph*, __ U.S. __, 121 S. Ct. 513 (2000) this Court was presented with the issue of whether the high cost of arbitration prevented the claimant from vindicating her statutory rights under the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA"). The claimant asserted that the silence of the applicable arbitration agreement on the issue of costs created a "risk" that she would be required to bear prohibitive arbitration costs if she pursued her claim in an arbitral forum. *See Green Tree*, __ U.S. __, 121 S. Ct. at 522. The Court rejected this hypothetical rendering of the costs involved, stating "[T]he 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." *Id.* The party who seeks to invalidate an arbitration clause bears the burden of showing the likelihood of incurring such costs. *Id.* Unlike the claimant in *Green Tree*, Petitioner in this case meets the burden of establishing the prohibitive expense of proceeding through the arbitration process.

As noted *supra*, Petitioner's complaint in Tennessee state court seeks damages on her behalf and on behalf of a class of similarly situated persons for violation of the TCPA, breach of the duty of good faith and fair dealing; unjust enrichment; and breach of the principal-agency relationship. The complaint asserts claims for monetary damages in an amount up to $74,000, but expressly disclaims recovery greater than $74,000 per individual member of the proposed Class. Under the fee schedule of the agency designated by Respondents to conduct the arbitration in this case, the National Arbitration Forum, the amount of Petitioner's monetary claim for damages requires a filing fee of $275 plus 1% of the excess over $15,000. *See* App., *infra*, at 26a.

The fee schedule provides for a separate filing fee of $275 for non-monetary relief of a value in excess of $15,000. *See id.* Petitioner has made such a request in the form of requests for declaratory and injunctive relief and would be required to pay the additional filing fee under the language of the fee schedule. If Petitioner "makes any request or motion," she is required to pay an unspecified fee, the amount of which is determined by contacting the office of the National Arbitration Forum. *See id.* Each subpoena request made by Petitioner requires a fee of $50. *See id.* Any discovery order requested by Petitioner requires a minimum fee of $100, with no specified maximum fee. *See id.* Any continuance, postponement or cancellation of a hearing, order, or event requires a minimum fee of $100, with no specified maximum fee. *See id.* Any expedited document hearing requires a minimum fee of $750, with no specified maximum fee, and an expedited participatory hearing requires a minimum fee of $1,000, with no specified maximum fee. *See* App., *infra*, at 28a. The fee for a non-expedited participatory hearing involving a claim of the amount demanded in this case is $1,250 for an initial session and $1,000 for each additional session. *See id.* Any request for a participatory hearing requires the pre-payment of hearing fees. *See* App., *infra*, at 36a. Numerous other fees are delineated in the fee schedule and could be incurred during the course of the arbitration proceedings.

Thus, in a basic proceeding in which Petitioner filed her claim seeking monetary and declaratory relief (combined filing fee – $550), filed five subpoenas ($250), sought one discovery order ($100), cancelled or delayed one hearing ($100), and conducted a participatory hearing lasting two days ($2,250), the total cost would be $3,250.

Unlike the situation presented to the Court in *Green Tree*, in which the claimant relied solely on cost analogies drawn

from other cases to support her argument, Petitioner in this case can specify the cost of being forced to arbitrate her claims utilizing the National Arbitration Forum, and the cost is demonstrably prohibitive. The unavoidable result of mandatory arbitration in this case would be an abandonment by Petitioner of her claims under the TCPA and Tennessee common law. This result is unconscionable under applicable Tennessee law. *See Advantage Sales, supra*, 1987 WL 16123, at *2. Because of Petitioner's ability to specify the costs she will incur in arbitration and the way those costs may work to prevent the vindication of state statutory rights, this case presents an advantageous factual framework within which the Court may resolve the issue recently left undecided in *Green Tree*.

B. PETITIONER IS PROHIBITED FROM PROCEEDING IN A CLASS SUIT

The arbitration clause at issue purports to take away the availability of the class action device as a vehicle for vindication of consumer rights. Under the TCPA, the Tennessee legislature once prohibited class actions, but it expressly deleted the limitation in 1991. *See* 1991 TENN. PUB. ACTS Ch. 468 § 3. Class actions are a useful tool for vindicating and enforcing consumers' rights. As this Court has stated, "[I]t is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages" and "aggrieved persons may be without any effective redress unless they employ the class action device." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

If the actions of the courts below enforcing the arbitration agreement are allowed to stand, the availability of class actions under Rule 23 of the Tennessee Rules of Civil Procedure and § 47-18-109 of the TCPA would be severely curtailed. If class actions become unavailable as a litigation

option, most consumer claims involving relatively small sums of money will be without a remedy. This Court has recognized that class actions "may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).[6] Here, Respondent attempts to remove the class action device via an arbitration clause in an adhesion contract so as to compel Petitioner to finance every step of a proceeding that strips her of nearly all of her substantive rights. This result is contrary to the prior decisions of this Court and should not be allowed to stand.

C. PETITIONER'S RIGHT TO A TRIAL BY JURY IS REMOVED BY THE ARBITRATION CLAUSE

The right to a trial by jury is set forth in the Seventh Amendment to the United States Constitution. *See* U.S.C.A. Const. Amend. 7. By enforcing the arbitration clause at issue in this case, Respondent purports to remove Petitioner's right to a trial by jury on her TCPA and Tennessee common-law claims. In cases filed pursuant to the TCPA, the right to a jury is firmly entrenched. *See, e.g., Adkisson v. Harpeth Ford-Mercury, Inc.*, 1991 WL 17177 (Tenn. Ct. App., Feb. 15, 1991). The TCPA contains a clear statement that "[N]o provision of this part [the TCPA] may be limited or waived by contract, or otherwise, notwithstanding any other

---

6. Commentators have also noted that binding arbitration can effectively eliminate the ability of consumers to bring or participate in class action litigation. *See, e.g.*, Kaplinsky and Levin, *Banks Can Use Arbitration Clauses As a Defense to Class Actions*, 7 Business Law Today 24 (May/June 1998); Dunham, *The Arbitration Clause As Class Action Shield*, 16 Franchise Law Journal 141 (Spring 1997).

provision of law to the contrary . . ." App., *infra*, at 24a. Simply stated, Petitioner did not knowingly waive her right to trial by jury by signing the RAL application and, therefore, did not waive her substantive right to a jury set forth in the Seventh Amendment to the U.S. Constitution and Tennessee case law interpreting the TCPA. Respondent did not inform Petitioner that signing the RAL application at issue in this case waived her right to air her claims before a jury. Instead, the arbitration clause was included in approximately eight-point type on the back page of the RAL application. The Alabama Supreme Court has stated that "regardless of the federal courts' policy favoring arbitration, nothing in the FAA . . . would permit such a waiver [of a jury trial] unless it is made knowingly, willingly, and voluntarily." *Allstar Homes, Inc. v. Waters*, 711 So.2d 924, 929 (Ala. 1997). A knowing, willing and voluntary waiver did not occur in this case, and enforcement of the arbitration agreement would be substantively unconscionable under Tennessee law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GORDON BALL
BANK OF AMERICA CENTER
550 West Main Avenue
Suite 750
Knoxville, Tennessee 37902
(865) 525-7028

PAT M. BARRETT, JR.
Counsel of Record
MARSHALL H. SMITH, JR.
BARRETT LAW OFFICE, P.A.
404 Court Square North
Post Office Box 987
Lexington, Mississippi 39095
(662) 834-2376

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION AND PER CURIAM JUDGMENT OF THE COURT OF APPEALS OF TENNESSEE AT KNOXVILLE DATED AND FILED MAY 4, 2000

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

CHRISTINE BERKLEY, Individually and on behalf of all persons similarly situated, etc.

v.

H&R BLOCK EASTERN TAX SERVICES, INC.

Direct Appeal from the Circuit Court for Carter County
No. C7219 Hon. Thomas J. Seeley, Jr., Circuit Judge

No. E1999-00379-COA-R9-CV — Decided May 4, 2000

* * *

FRANKS, J., delivered the opinion of the court, in which GODDARD, P.J., and SUSANO, J., joined.

* * *

OPINION

The dispositive issue on appeal is whether the contract signed by the parties containing an arbitration agreement is enforceable.

Appendix A

In 1986, the Internal Revenue Service first allowed taxpayers to electronically file tax returns, and defendant H&R Block ("Block") began offering electronic filing through a program known as "Rapid Refund" as a part of its tax preparation services. For the 1987 tax year, Block, in conjunction with various lenders, began promoting another service known as the "Refund Anticipation Loan" or "RAL", which allows taxpayers to receive a loan from the lender using their anticipated tax refund as collateral.

Block customers given the RAL option, must first complete an application. The application is then sent via "Compuserve" in Ohio to the lender, Beneficial National Bank, in Delaware. Once approved by the lender, within two to four days, a check is presented by Block to the customer. In this process, the customer pays Block its usual preparation and electronic filing fees, and if the application is approved, the customer also pays the lender a finance charge.

Plaintiff, Christine Berkley, contracted with Block in 1994, 1995, 1996 and 1997 to assist her in preparing her federal income tax returns for those years. Having been advised by Block that she could receive her refund much sooner if she obtained a RAL, plaintiff applied for RALs in at least three of those years.

Plaintiff executed the standard RAL application form in 1997 for the 1996 tax year. The application disclosed the cost of the loan and included a specific warning that "because the APR on a RAL may be high in certain cases relative to other sources of credit, you may wish to use such sources; e.g., credit cards, equity loans, etc., instead of a RAL."

Appendix A

Section 7 of the RAL application is an agreement to arbitrate. This provision, which was not in the applications of prior years, is as follows:

> **ARBITRATION:** The parties to this RAL application, the Loan Agreement on the RAL check that I signed and any such prior agreements involving the same parties (collectively, the "Agreements") hereby agree that any claim or dispute (whether in contract, tort or otherwise) in any way relating to the Agreements or relating to the relationships of such parties including the validity or enforceability of this arbitration provision or any part thereof, (collectively the "Claim"), shall be resolved, upon the election of either party, by binding arbitration pursuant to this arbitration provision and the Code of Procedure of the National Arbitration Forum in effect at the time the Claim is filed. No class actions are permitted to this arbitration without the consent of the parties. The parties agree that for purposes of this arbitration provision, H&R Block, Inc., its subsidiaries, franchisees, affiliates, agents, and employees (collectively "Block") shall be an intended third party beneficiary of the Agreements and a party to this arbitration provision and any transaction made pursuant to these Agreements involving Block shall be considered a Claim and resolved pursuant to this arbitration provision. Rules and forms of the National Arbitration Forum may be obtained by calling (800) 474-2371 and all Claims shall be filed by certified mail at any

National Arbitration office or at Post Office Box 50191, Minneapolis, Minnesota 55405. Any participatory arbitration hearing that I attend will take place in the federal judicial district in which I live. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16. The award of the Arbitrator shall apply relevant law and provide written, reasoned findings of fact and conclusions of law, and shall not be subject to appeal. Judgment upon the award may be entered in any court having jurisdiction. Nothing in this arbitration provision shall be construed to prevent BNB's use of offset of other contractual rights involving my income tax refund or other amount on deposit with BNB to pay off any RAL debts nor or hereafter owed by me to BNB or any other RAL Lender or ERO pursuant to the Agreements. **The parties hereto acknowledge that they have a right to litigate claims in court, but they prefer to resolve such claims through arbitration and hereby waive their rights to litigate such claims in court upon election of arbitration by either party.** The parties further agree that any Claim hereunder shall be limited to no more than the claimant's actual compensatory, economic damages plus punitive damages, if any in the Arbitrator's discretion, of no more than 3 times the claimant's respective actual compensatory, economic damages or $50,000 whichever is lesser, and that each party shall bear the expense

> of their respective attorney's fees regardless of which party prevails.

(Bold in original.)

Plaintiff, in her complaint, charged Block with engaging in unfair or deceptive conduct by, among other things, failing to disclose to her and other Block customers that it received "kickbacks" from the "Refund Anticipation Loan" program. Plaintiff's complaint alleged a violation of the Tennessee Consumer Protection Act, T.C.A. §47-18-101 *et seq*; breach of Brock's duty to deal with her fairly and in good faith, and breach of Brock's fiduciary duty and unjust enrichment. Subsequently, she filed a "First Amended Complaint" dropping the claim for breach of fiduciary duty, and adding the claim for breach of principal-agency relationship. Subsequently, she moved to amend the complaint to particularize the factual allegations to seek injunctive relief and demand a jury.

Subsequently, the Trial Court refused to compel arbitration, but granted an interlocutory appeal, which this Court accepted, pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure.

The arbitration agreement states that "any claim or dispute (whether in contract, tort or otherwise) in any way" relating to the RAL program "shall be resolved, upon the election of either party, by binding arbitration." Block has clearly announced its election to submit the dispute to arbitration.

Appendix A

The Federal Arbitration Act, 9 U.S.C. §2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The Supreme Court of Tennessee recently reiterated and emphasized the applicability of the FAA in the courts of this state in *Frizzell Construction Co. Inc. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79 (Tenn. 1999).

A contract "evidencing a transaction involving commerce" may be regulated by Congress as part of its authority to regulate interstate commerce, and includes intrastate activities that have a substantial relation to interstate commerce. *See Frizzell Construction*, 9 S.W.3d at 83 (citing *United States v. Lopez*, 514 U.S. 549, 557-59 (1995)). In this case, the Agreement containing the arbitration provision clearly is one that involves such commerce and is therefore within the scope of the FAA.

As the United States Supreme Court explained in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the FAA not only "declared a national policy favoring arbitration," but

actually "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." 465 U.S. at 10. The FAA enforces arbitration agreements according to the terms of those agreements, allowing the parties to determine the scope of arbitration.

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the issue was whether punitive damages could be properly considered under the parties' arbitration agreement. The Court stated:

> [W]e think our decisions in *Allied-Bruce*, *Southland*, and *Perry*, make clear that if contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration. Thus, the case before us comes down to what the contract has to say about the arbitrability of petitioners' claim for punitive damages.

514 U.S. at 52.

In this case, the arbitration clause provides that all issues "including the validity or enforceability of this arbitration provision or any part thereof" shall be resolved by binding arbitration. The United States Supreme Court has decided that parties may contract to arbitrate this type of dispute under the FAA even if state law would prevent arbitration. *See Mastrobuono* at 52. The Tennessee Supreme Court has

also recognized this principle, where the parties contract to arbitrate under the FAA. *Frizzell Construction Company, Inc. v. Gatlinburg, LLC.*, 9 S.W.3d 79 (Tenn. 1999), (holding that some issues may be excluded by law from arbitration where the parties agree to be bound by Tennessee law.) It follows that the parties may contract to arbitrate the question of the validity and enforceability of the arbitration clause itself. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995) (holding that courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clear and unmistakable" evidence that they did so.). *Cf. Green Tree v. Wampler*, 749 So.2d 409, 415 (Ala. 1999), where the Supreme Court of Alabama held that the issue of whether an arbitration clause is unconscionable is to be decided by a court of law and not arbitration.

Because the contract specifically states that the parties agreed to arbitrate the question of the validity or enforceability of the arbitration agreement, and because the choice of law clause states that Federal law and Delaware law apply, the parties must submit the question of arbitration to arbitration.[1]

The judgment of the Trial Court on this issue is reversed, and the cause remanded with instructions to order the parties

---

1. As to Delaware law, the Tennessee Consumer Protection Acts states: T.C.A., §18-113(b). Any provision in any agreement or stipulation, verbal or written, restricting jurisdiction or venue to a forum outside this state, or requiring the application of the laws of another state with respect to any claim arising under or relating to the Tennessee Consumer Protection Act and related acts set forth in this title, is void as a matter of public policy. . . .

to arbitrate the validity and enforcement of the arbitration clause. If the arbitrator finds the clause not enforceable, the Court will proceed to resolve the disputes between the parties. If the arbitrator determines that the arbitration clause is enforceable, then the parties will be required to arbitrate all issues covered by the arbitration agreement.

The cause is remanded, with the cost of the appeal assessed to appellee.

Appendix A

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

CHRISTINE BERKLEY, Individually and on behalf of all persons similarly situated, etc.

v.

H&R BLOCK EASTERN TAX SERVICES, INC.

Direct Appeal from the Circuit Court for Carter County
No. C7219 Hon. Thomas J. Seeley, Jr., Circuit Judge

No. E1999-00379-COA-R9-CV — Decided May 4, 2000

JUDGMENT

This cause was regularly heard and considered by the court. IT IS NOW ORDERED that the judgment of the Trial Court is reversed, and the cause remanded. The costs of appeal are adjudged to appellee, for which execution may issue if necessary.

PER CURIAM

APPENDIX B — ORDER OF THE CIRCUIT COURT FOR CARTER COUNTY AT ELIZABETHTON, TENNESSEE DATED JUNE 21, 1999 AND FILED JUNE 23, 1999

IN THE CIRCUIT COURT FOR CARTER COUNTY
AT ELIZABETHTON, TENNESSEE

Civil Action No. C7219

CHRISTINE BERKLEY, Individually and on behalf of all persons similarly situated in Tennessee, Colorado, Connecticut, Florida, Illinois, Kansas, Michigan, Missouri, New Jersey, North Carolina, Ohio, Washington, Wisconsin, and the District of Columbia,

Plaintiffs,

v.

H & R BLOCK, INC., H & R BLOCK EASTERN TAX SERVICES, INC., and BLOCK FINANCIAL CORP.,

Defendants.

ORDER

This proposed multistate class action came on for a hearing on April 12, 1999, on Defendants' Motion to Compel Arbitration and Defendants H & R Block, Inc.'s, and Block Financial Corp.'s Motion to Dismiss for Lack of Personal Jurisdiction. Upon consideration of Defendants' motions, affidavits, and supporting briefs, Plaintiffs reply and opposing affidavit, the argument of counsel, and the record as a whole, the Court rules as follows:

Appendix B

The Court finds that Defendants H & R Block, Inc., and Block Financial Corp. do not have sufficient minimum contacts with Tennessee to support the exercise of personal jurisdiction over them. Therefore, Defendants H & R Block, Inc., and Block Financial Corp.'s Motion to Dismiss for Lack of Personal Jurisdiction is granted. If subsequent discovery discloses additional facts relevant to this issue, Plaintiff is free to seek leave to add these Defendants back into the case by amendment. Accordingly, Plaintiffs Motion for Deferral of a Ruling on Defendant H & R Block, Inc. And Block Financial Corp.'s Motion to Dismiss for Lack of Personal Jurisdiction Pending Plaintiff Conducting Discovery on the Issue of Personal Jurisdiction is moot and, therefore, denied.

With respect to Defendants' Motion to Compel Arbitration, the Court notes concerns as to the validity or enforceability of the arbitration clause and, given the Court's uncertainty as to whether the Federal Arbitration Act preempts inconsistent provisions contained in the Tennessee Consumer Protection Act, as reflected in the Transcript of the April 12, 1999 hearing which is incorporated herein by reference and attached hereto, the Court declines to compel arbitration.

In response to Defendants' oral motion at the hearing, the Court grants permission to pursue an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. This motion is granted for the following reasons: First, a post-trial appeal of this Court's ruling as to the enforceability of the arbitration agreement at issue would be ineffectual and a waste of judicial resources should this case be tried only to have the Court of Appeals or Supreme Court later find that the arbitration clause was, in fact,

enforceable. Such a result would cause the parties additional and unnecessary discovery, class certification, and litigation expense as well as causing extreme delay in reaching a final resolution of this matter. Second, arbitration agreements in the consumer context are becoming more and more prevalent. There is a need to create a uniform body of law regarding the enforceability of such agreements pursuant to the Federal Arbitration Act ("FAA"). Thus, in the interests of orderly case management, judicial economy, and fairness to the parties, the issue of arbitrability should be resolved definitively before proceeding to discovery and class certification.

For these same reasons, all discovery or other action in this case is hereby stayed pending completion of any appeal of this Order.

Enter pursuant to Rule 58.

s/ Thomas J. Seeley, Jr.
Judge Thomas J. Seeley

Appendix B

APPROVED FOR ENTRY:

s/ Alice K. Corker
Gary C. Shockley, BPR No. 010104
Alice K. Corker, BPR No. 017437

BAKER, DONELSON, BEARMAN & CALDWELL
1700 Nashville City Center
511 Union Street
P.O. Box 190613
Nashville, Tennessee 37219
(615) 726-5600

N. Louise Ellingsworth
Michael D. Pospisil
BRYAN CAVE, LLP
1200 Main Street, Suite 3500
Kansas City, Missouri 64105-2100
(816) 374-3200

Counsel for Defendants

APPENDIX C — PER CURIAM ORDER OF THE SUPREME COURT OF TENNESSEE AT KNOXVILLE DENYING APPLICATION FOR PERMISSION TO APPEAL DATED AND FILED NOVEMBER 6, 2000

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

CHRISTINE BERKLEY, ET AL. V. H&R BLOCK EASTERN TAX SERVICES, INC.

No. E1999-00379-SC-R11-CV

ORDER

Upon consideration of Christine Berkley's application for permission to appeal and the record before us, the application is denied.

The motion of H&R Block Eastern Tax Services, Inc. to dismiss is denied.

PER CURIAM

APPENDIX D — RELEVANT STATUTES

9 U.S.C. § 2

UNITED STATES CODE ANNOTATED
TITLE 9. ARBITRATION
CHAPTER 1 — GENERAL PROVISIONS

§ 2. Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

* * *

9 U.S.C. § 3

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of

one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

* * *

9 U.S.C. § 4

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such

arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

* * *

9 U.S.C. § 9

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party

to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

* * *

Appendix D

T.C.A. § 47-18-109

TENNESSEE CODE ANNOTATED
TITLE 47 COMMERCIAL INSTRUMENTS AND TRANSACTIONS
CHAPTER 18 CONSUMER PROTECTION
Part 1 — Consumer Protection Act of 1977

47-18-109 Private right of action — Damages — Notice to division.

(a)(1) Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be ūnlawful by this part, may bring an action individually to recover actual damages.

(2) The action may be brought in a court of competent jurisdiction in the county where the alleged unfair or deceptive act or practice took place, is taking place, or is about to take place, or in the county in which such person resides, has such person's principal place of business, conducts, transacts, or has transacted business, or, if the person cannot be found in any of the foregoing locations, in the county in which such person can be found.

(3) If the court finds that the use or employment of the unfair or deceptive act or practice was a willful or knowing violation of this part, the court may award three (3) times the actual damages sustained and may provide such other relief as it considers necessary and proper.

(4) In determining whether treble damages should be awarded, the trial court may consider, among other things:

(A) The competence of the consumer or other person;

(B) The nature of the deception or coercion practiced upon the consumer or other person;

(C) The damage to the consumer or other person; and

(D) The good faith of the person found to have violated the provisions of this part.

(5) The provisions of this subsection do not apply with respect to alleged violations of the Tennessee Equal Consumer Credit Act of 1974, compiled in part 8 of this chapter.

(b) Without regard to any other remedy or relief to which a person is entitled, anyone affected by a violation of this part may bring an action to obtain a declaratory judgment that the act or practice violates the provisions of this part and to enjoin the person who has violated, is violating, or who is otherwise likely to violate this part; provided, that such action shall not be filed once the division has commenced a proceeding pursuant to § 47-18-107 or § 47-18-108.

(c)(1) Any person who has been affected by an act or practice declared to be a violation of this part may accept

any written reasonable offer of settlement made by the person or persons considered to have violated this part; provided, that the tender of acceptance of such a settlement offer shall not abate any proceeding commenced by the division pursuant to § 47-18-107 or § 47-18-108.

(2) Such a settlement may be set aside by a court of competent jurisdiction at the request of the affected person or of the division if such a request is made within one (1) year from the date of the settlement agreement and if the court finds the settlement to be unreasonable.

(3) In determining the reasonableness of a settlement, the court shall consider:

(A) The competence of the consumer or other person;

(B) The nature of the deception or coercion practiced upon the consumer or other person;

(C) The value of the consideration received; and

(D) The nature and extent of the legal advice received by the consumer or other person.

If the consumer or other person was not represented by legal counsel at the time of the offer of settlement, the person claiming the benefit of the settlement shall have the burden of establishing that it is reasonable.

(4) In any private action commenced under this section, the court may, upon the introduction of proof that the person against whom the action is filed has made a written, reasonable offer of settlement which has been communicated to the affected party, limit the amount of recovery to the terms of the offer of settlement.

(d) Any permanent injunction, judgment, or final court order made pursuant to § 47-18-108, or assurance of voluntary compliance entered into pursuant to § 47-18-107, which has not been complied with, shall be prima facie evidence of the violation of this part in any action brought pursuant to this section.

(e)(1) Upon a finding by the court that a provision of this part has been violated, the court may award to the person bringing such action reasonable attorney's fees and costs.

(2) In any private action commenced under this section, upon finding that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment, the court may require the person instituting the action to indemnify the defendant for any damages incurred, including reasonable attorney's fees and costs.

(3) The provisions of this subsection shall not apply to an action initiated by the division.

(f)(1) Upon the commencement of any action brought under subsections (a) and (b), the clerk of the court shall mail a copy of the complaint or other initial pleading to the division and, upon the entry of any judgment, order, or decree

in the action, shall mail a copy of such judgment, order or decree to the division.

(2) A copy of any notice of appeal shall be served by the appellant upon the director of the division, who in the public interest may intervene on appeal.

* * *

T.C.A. § 47-18-113

47-18-113 Waiver of rights — Restrictions on jurisdiction or venue prohibited.

(a) No provision of this part may be limited or waived by contract, agreement, or otherwise, notwithstanding any other provision of law to the contrary; provided, that the provisions of this part shall not alter, amend, or repeal the provisions of the Uniform Commercial Code relative to express or implied warranties or the exclusion or modification of such warranties.

(b) Any provision in any agreement or stipulation, verbal or written, restricting jurisdiction or venue to a forum outside this state or requiring the application of the laws of another state with respect to any claim arising under or relating to the Tennessee Consumer Protection Act and related acts set forth in this title is void as a matter of public policy. Further, no action of a consumer or other person can alter, amend, obstruct or abolish the right of the attorney general and reporter to proceed to protect the state of Tennessee and consumers or other persons within this state

or from other states who are victims of illegal practices of persons located, wholly or in part, in Tennessee's borders.

(c)(1) No other right or benefit conferred on consumers by any other provision of this code may be waived or otherwise varied except as provided for in this section.

(2) Any waiver of a right or benefit described in this subsection must be knowingly and intelligently made.

(3) The competence of the consumer, the consumer's actual knowledge of the rights or benefits being waived, or lack thereof, the manner in which the right or benefit was pointed out to the consumer at the time of the consumer transaction, the nature of the deception or coercion practiced upon the consumer, the nature and extent of the legal advice received by the consumer, and the value of consideration received are relevant to the issue of whether the waiver was knowingly and intelligently made.

(4) If the consumer was not specifically informed of the effect of the waiver and did not specifically waive such consumer's rights or benefits at the time of the consumer transaction, the party claiming waiver shall have the burden of establishing that the waiver was knowingly and intelligently made.

* * * *

APPENDIX E — EXCERPT FROM NATIONAL ARBITRATION FORUM – CODE OF PROCEDURE

[commencing at page 30]

The Forum
P.O. Box 50191
Minneapolis, MN 55405-0191 USA
(651) 631-1105 (800) 474-2371
info@arb-forum.com
ARBITRATION-FORUM.COM

FILING FEES FOR CLAIMS ABOVE $15,000 OR FOR NON-MONETARY RELIEF

Claim Amount	Filing Fee
US$15,000 to US$99,999	US$275 + 1% of the excess over US$15,000
Less than US$500,000	$1,125 + 0.75% of the excess over US$100,000
Less than US$1,000,000	US$4,125 + 0.50% of the excess over US$500,000
Less than US$5,000,000	US$6,625 + 0.25% of the excess over US$1,000,000
Above US$5,000,000	No additional filing fee
Claims for non-monetary relief of a value in excess of US$15,000	US$275, plus filing fee for value of relief sought

Appendix E

Filing fees for claims which are not Small Claims include administrative fees, but do not include Document Hearing fees or Participatory Hearing fees, which shall be paid by the party requesting the Hearing.

Claim Amount. Claim Amount is calculated by including the amount of the Claim, interest, and attorney's fees (if they are sought). If there is no specific amount stated for attorney's fees (if they are sought), 15% of the Claim amount should be used, subject to later amendment. Issues regarding Claim Amount shall be resolved as provided by the Code.

Amendments. An amended Claim that increases the original claim amount or original value of relief sought must be accompanied by a filing fee reflecting this difference in claim amount or value.

Responses and Counter Claims. There is no fee for filing a Response, including affirmative defenses and set-offs. There is a fee for any Counter Claim included in a response, which is calculated in the same manner as fees for initial Claims.

Cross-claims, Third Party Claims, Joinder, Intervention. A Cross-claim, Third Party Claim, Joinder or Intervention which makes a claim independent or separate of relief sought in the claim or Counter Claim must be accompanied by a filing fee reflecting the value of that independent or separate claim.

Request Fees. A party who makes any Request or Motion shall do so under Rule 18 and pay a fee. A party may contact the Forum for fee information. A Request may not be allowed by an Arbitrator or Director unless the fee is paid.

Appendix E

Subpoena Fee. A party who requests a subpoena shall pay a fee of US$50.

Discovery Fee. A party who seeks an order shall pay a minimum fee of US$100.

Continuance Fee. A party or parties who seek a continuance, postponement, or cancellation of a hearing, order, or event shall pay a minimum fee of US$100.

Multiple Submissions. The Forum may assess a fee in cases where a party submits multiple submissions.

Expedited Hearing. There is an additional, minimum fee of US$750 for an Expedited Document Hearing and US$1,000 for an Expedited Participatory Hearing. The Director may assess a higher fee.

Findings and Conclusions. Where the Arbitration Agreement requires that an Award include written findings of fact, conclusions of law, or reasons to explain an award, the Claimant shall pay a fee for these written explanations equal to the fee for one additional hearing session. Where a Party requests findings of fact, conclusions of law or a written explanation, that Party shall pay a fee equal to the fee for one additional hearing session.

Refund of Filing Fees. In a case which is not a "Small Claim," a party may submit a written request to the Director for a partial Filing Fee refund in the following situations.

Appendix E

A. If a Claimant is unable to obtain service on Respondent and dismisses the Claim no later than ninety (90) days after the filing date, the partial refund will be fifty percent (50%) of the Filing Fee.

B. A partial refund may be allowed in other cases at the discretion of the Director.

Determination of Other Fees. The Director establishes fees for all other rules. Parties may obtain the amount of a fee by contacting The Forum.

Adjustment of Fees. In cases where fees are paid by a Party other than a Claimant, the Director has the authority to modify the amount of the fees.

HEARING FEES

The following provisions apply to both Document Hearings and Participatory Hearings. All fees are in U.S. dollars.

Amount in Controversy. The amount in controversy is the total of all claims and the value of non-monetary relief sought.

Prepayment of Fees. The appropriate Hearing or Request Fee must accompany any Request for an Order or a Hearing. The Party or Parties requesting the Order or Hearing shall prepay the fee. By agreement, Parties may jointly pay the fee.

Multi-party Hearing. These fees include two-party hearings involving one claimant and one respondent. Additional fees

determined by the Director may be added for each additional party in cases other than Small Claim cases.

Arbitration Panel. In Document Hearings or Participatory Hearings where the amount in controversy is less than one million dollars (US$1,000,000), where the parties agree to multiple arbitrators, a fee determined by the Director will be added for each additional arbitrator.

Refund of Hearing Fees. The Director may order a partial Hearing Fee refund if the party withdraws the demand for the Hearing at least fifteen (15) days before the hearing. The Director may order a partial Hearing Fee refund if the Hearing does not require as many sessions as scheduled by the Parties.

Waiver of Hearing Fees. An individual who is indigent and cannot afford to pay hearing fees may request, in writing, that the Director waive the fees. See Rule 45 of the *Code of Procedure*.

International Arbitrations. The Director may assess additional fees for arbitrations conducted outside the United States or involving Parties from more than one country.

Appendix E

DOCUMENT HEARINGS

These fees include all costs for a Document Hearing, including arbitrator fees.

Claim Amount	Hearing Fee
For Small Claims, Document Hearing fees are included in Administrative fees.	
US$15,000 – US$ 24,999	US$500
US$25,000 – US$49,999	US$750
US$50,000 – US$74,999	US$1,000
US$75,000 – US$99,999	US$1,250
US$100,000 – US$249,999	US$1,750
US$250,000 – US$499,999	US$3,000
US$500,000 – US$4,999,999	US$5,000
US$5,000,000 – and above	US$10,000

Appendix E

TELEPHONE PARTICIPATORY HEARINGS

These fees include all costs for a Telephone Participatory Hearing, including arbitrator fees.

Amount in Controversy	**Hearing Fee**
US$ 0 – 14,999	See Small Claims Fees
US$15,000 – 24,999	US$500 initial session; US$450 each additional session
US$25,000 – 49,999	US$ 750 initial session; US$ 650 for each additional session
US$50,000 – 99,999	US$1,000 initial session; US750 for each additional session
US$100,000 – 249,999	US$1,500 initial session; US$1,250 for each additional session
US$250,000 – 499,999	US$2,000 initial session; US$1,500 for each additional session
US$500,000 – 999,999	US$2,500 initial session; US$1,750 for each additional session

Appendix E

US$1,000,000 – 4,999,999	US$3,000 initial session; US$2,500 for each additional session
US$5,000,000 and above	Contact Director for fees

Telephone Service Each party is responsible for providing and paying for telephone service at each location where that Party or a representative will participate in a Telephone Participatory Hearing and for telephone charges for communication with the Arbitrator.

ON-LINE PARTICIPATORY HEARINGS

These fees include all costs for an On-line Participatory Hearing, including arbitrator fees.

Amount in Controversy	**Hearing Fee**
US$ 0 – 14,999	See Small Claims Fees
US$15,000 – 24,999	US$500 initial session; US$450 each additional session
US$25,000 – 49,999	US$750 initial session; US$650 for each additional session
US$50,000 – 99,999	US$1,000 initial session; US$ 750 for each additional session

Appendix E

US$100,000 – 249,999	US$1,500 initial session; US$1,250 for each additional session
US$250,000 – 499,999	US$2,000 initial session; US$1,500 for each additional session
US$500,000 – 999,999	US$2,500 initial session; US$1,750 for each additional session
US$1,000,000 – 4,999,999	US$3,000 initial session; US$2,500 for each additional session
US$5,000,000 and above	Contact Director for fees

On-line Service Each Party is responsible for providing and paying for On-line service and application software compatible with that of the Arbitrator at each location where that Party or a representative will participate in an On-line Participatory Hearing and for any charges necessary for communication with the Arbitrator.

Appendix E

IN-PERSON PARTICIPATORY HEARINGS

These fees include all costs for an In-Person Participatory Hearing, including arbitrator fees.

Amount in Controversy	**Hearing Fee**
US$ 0 – 14,999	See Small Claims Fees
US$15,000 – 24,999	US$650 initial session; US$450 each additional session
US$25,000 – 49,999	US$950 initial session; US$750 for each additional session
US$50,000 – 99,999	US$ 1,250 initial session; US$ 1,000 for each additional session
US$100,000 – 249,999	US$1,750 initial session; US$1,500 for each additional session
US$250,000 – 499,999	US$2,250 initial session; US$2,000 for each additional session
US$500,000 – 999,999	US$2,750 initial session; US$2,000 for each additional session

Appendix E

US$1,000,000 – 4,999,999	US$4,750 initial session; US$4,500 for each additional session
US$5,000,000 and above	Contact Director for fees

In-Person Participatory Hearing Sessions. Hearing sessions are typically scheduled for 9:00 a.m. and 1:30 p.m. local time on business days and may be scheduled at other times by agreement of the parties and the Director or Arbitrator.

Other Participatory Hearings. Hearing sessions will be scheduled by the Director, taking into account the local time at the location of the Arbitrator and the Parties.

Requests for a Participatory Hearing. Requests for a Participatory Hearing shall contain the requesting Party's estimate of the number of sessions required, taking into account the rights of all Parties under Rule 35A and any request or requirement for a written Award. The request shall be accompanied by payment of the fee described in the Participatory Hearing Fee Schedule, payable by the Party requesting the Participatory Hearing. No request for a Participatory Hearing session is effective without payment of the appropriate fee, unless the Director has granted a waiver under Rule 45 or unless a Consumer does not have to pay a fee.

Location of Hearing. Rule 32 provides that an In-Person Participatory Hearing will be held in the area where the

Appendix E

Respondent resides or has a principal place of business, unless the arbitration agreement designates or the parties agree to a different location. Business entities commonly are doing business where a Consumer Party resides, and an In-Person Participatory Hearing will be held in the area where the Consumer resides. Parties may participate in an On-line Participatory Hearing or a Telephone Participatory Hearing at the location of the Party's choice. Parties are responsible for on-line or telephone service to participate in the Hearing.

Additional Hearing Fees. Before or after the beginning of a Participatory Hearing, if any party asserts that the Participatory Hearing requires additional sessions, the Director or Arbitrator shall require that Party or the requesting Party pay in advance for additional sessions in accord with Rule 44. If at any time during a Participatory Hearing, the Arbitrator or Director determines that the Hearing cannot be completed within the sessions properly requested, the Arbitrator or Director may suspend the hearing until the responsible Party has requested sufficient sessions to allow the hearing to be properly completed.

* * * *

(2)

Supreme Court, U.S.
FILED
MAR 7 2001
OFFICE OF THE CLERK

No. 00-1270

IN THE

Supreme Court of the United States

CHRISTINE BERKLEY, individually and on behalf of all persons similarly situated,
Petitioner,

v.

H&R BLOCK EASTERN TAX SERVICES, INC.,
Respondent.

On Petition for Writ of Certiorari to the Tennessee Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

BAKER, DONELSON, BEARMAN & CALDWELL
GARY C. SHOCKLEY
1000 COMMERCE CENTER
211 COMMERCE STREET
NASHVILLE, TENNESSEE 37201
(615) 726-5600

BRYAN CAVE LLP
N. Louise Ellingsworth*
Daniel R. Young
1200 Main Street, Suite 3500
Kansas City, Missouri 64105-2100
(816) 374-3200

Thomas C. Walsh
One Metropolitan Square
211 North Broadway,
Suite 3600
St. Louis, Missouri 63102-2750
(314) 259-2000
Attorneys for Respondents

*Counsel of Record

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

QUESTIONS PRESENTED

1. When a state court referring a matter to arbitration explicitly retains jurisdiction over the controversy, does this Court have jurisdiction to review the decision under 28 U.S.C. § 1257(a), which confers jurisdiction only over "final judgments and decrees" of state courts?

2. Does the petition present a viable cause of action inasmuch as petitioner's claims have been settled and released by a federal judgment approving a nationwide class action settlement from which she did not opt out?

3. Did the court below, in accordance with *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), correctly enforce the parties' agreement to submit the issue of arbitrability to the arbitrator?

4. Should this Court concern itself with the interplay between the Federal Arbitration Act and policies of Tennessee state law when the opinion of the Tennessee Court of Appeals does not address that issue?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
CORPORATE DISCLOSURE STATEMENT	1
STATEMENT OF JURISDICTION	1
A. There Is No Final Judgment.	1
B. Petitioner's Case is Barred by *Res Judicata*.	3
COUNTER-STATEMENT OF THE CASE	4
REASONS FOR DENYING THE PETITION	7
I. PETITIONER'S CONTENTION THAT ARBITRABILITY CANNOT BE DECIDED BY THE ARBITRATOR IS SQUARELY FORECLOSED BY *FIRST OPTIONS OF CHICAGO, INC. V. KAPLAN*, 514 U.S. 938 (1995)	7
II. THIS COURT SHOULD NOT REVIEW QUESTIONS OF TENNESSEE LAW THAT WERE NOT ADDRESSED BY THE COURT BELOW.	9
CONCLUSION	12

TABLE OF AUTHORITIES

Cases

AT&T Technologies, Inc. v. Communication Workers, 475 U.S. 643 (1986) 8

Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265 (1995) 10

Bailey v. Anderson, 326 U.S. 203 (1945) 9

Bill Walker & Assoc., Inc., v. Parrish, 770 S.W.2d 764 (Tenn. App. 1989), *appeal denied* *8*

Commodities Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) 11

First Options of Chicago, Inc. v. Kaplan, 514 U.S 938 (1995) 4, 7, 8

Frizzell Construction Co. Inc. v. Gatlinburg, L.L.C., 9 S.W.3d 79 (Tenn. 1999), *cert. denied*, 120 S.Ct. 2679 (2000) 5

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 9, 10, 11

Green Tree Financial Corp. v. Randolph, 121 S.Ct. 513 (2000) 2, 11

Jefferson v. City of Tarrant, 522 U.S. 75 (1997) 2

Market Street R. Co. v. Railroad Comm'n of Cal., 324 U.S. 548 (1945) 2

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 4

Perry v. Thomas, 482 U.S. 483 (1987) 9, 10

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 9

Southland Corp. v. Keating, 465 U.S. 1 (1984) . 10

Steelworkers v. Warrior & Gulf Nav. Co., 383 U.S. 574 (1960) *8*

Street v. New York, 394 U.S. 576 (1969) 9

Zawikowski v. Beneficial National Bank, 2000 WL 1051879 (N.D. Ill. 2000) 3

Statutes

9 U.S.C. § 1 4

9 U.S.C. § 16 2

28 U.S.C. § 1257(a) 1, 2

Tenn. Code Ann. § 29-5-303(d) 2

CORPORATE DISCLOSURE STATEMENT

Respondent H&R Block Eastern Tax Services, Inc. ("Block"), is a wholly-owned subsidiary of H&R Block Services, Inc., which is a wholly-owned subsidiary of H&R Block Group, Inc., which is a wholly-owned subsidiary of H&R Block, Inc. H&R Block, Inc. is publicly traded on the New York Stock Exchange under the symbol "HRB."

STATEMENT OF JURISDICTION

There are two jurisdictional bars to the grant of certiorari. First, the Tennessee Court of Appeals' decision is not a final judgment. Second, petitioner's case is barred by *res judicata* because she did not opt out of a nationwide class-action settlement that compromised her claims.

A. There Is No Final Judgment.

Rather than dismiss this action in favor of arbitration, the Tennessee Court of Appeals explicitly retained the trial court's jurisdiction over this matter during the arbitration proceedings. The opinion concluded: "the cause [is] remanded with instructions to order the parties to arbitrate the validity and enforcement of the arbitration clause. If the arbitrator finds the clause not enforceable, the Court will proceed to resolve the disputes between the parties. If the arbitrator determines that the arbitration clause is enforceable, then the parties will be required to arbitrate all issues covered by the arbitration agreement." Pet. Apdx 8a-9a.

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review final judgments of state courts which stand as "an effective determination of the litigation and not

merely interlocutory or intermediate steps therein. It must be 'the final word of a final court.'" *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997), *quoting Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945). Here, there has been no final disposition on the merits of either the litigation or the question of arbitrability, and thus there is no final judgment capable of review in this Court.

This case is critically different from *Green Tree Financial Corp. v. Randolph*, 121 S.Ct. 513, 519-20 (2000), in which the Court found that an order directing the parties to arbitration and *dismissing the case with prejudice* was a final order "leaving the court nothing to do but execute the judgment." Here, the Tennessee Court of Appeals has directed the parties to arbitrate the preliminary issue of arbitrability (as they had agreed) and then to return to the court if the arbitrator determines the clause is not enforceable. Under Tennessee practice, the court retains jurisdiction and stays, rather than dismisses, cases subject to arbitration.[1] The decision below did not effectively terminate this litigation, and under Section 16 of the Federal Arbitration Act, 9 U.S.C. § 16, the decision is therefore "interlocutory." Accordingly, this is not a final judgment in any sense of the term, and the Court lacks jurisdiction under 28 U.S.C. § 1257(a).

---

[1] *See* Tenn. Code Ann. § 29-5-303(d): "Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay."

B. Petitioner's Case is Barred by *Res Judicata*.

The petition does not present a viable case because petitioner's claims against respondent have been settled. Petitioner's individual and class claims were subsumed in a nationwide class action settlement approved by the Honorable James B. Zagel of the United States District Court for the Northern District of Illinois in *Zawikowski v. Beneficial National Bank*, Case Nos. 98-C-2178 and 98-C-2330.[2] The *Zawikowski* court has entered judgment approving settlement of the claims of a nationwide class of customers against the defendants, including respondent, arising out of Refund Anticipation Loan ("RAL") transactions occurring in the years 1987-99. Petitioner has alleged that she received a RAL in the years 1994-97 and is attempting to assert various claims against respondent under Tennessee law based upon her RAL transaction. Pet. Apdx 2a, 5a.

The *Zawikowski* settlement was preliminarily approved on January 5, 2000, and, following notice to the class and hearings on the adequacy of the settlement, a final judgment approving the settlement was entered on February 16, 2001. Absent a reversal of the judgment entered in the Northern District of Illinois, petitioner's claims have been released. She did not opt out of the settlement class, has not moved to intervene in the *Zawikowski* proceedings, and has not sought a stay or other relief from the settlement in any court. Accordingly, the claims she purports to assert in this action are barred by principles of *res judicata*, and the questions supposedly presented by the petition are not live issues.

---

[2] An earlier order in that case discusses the history of the RAL litigation and the settlement terms. *Zawikowski v. Beneficial National Bank*, 2000 WL 1051879 (N.D. Ill. 2000).

COUNTER-STATEMENT OF THE CASE

Petitioner Christine Berkley asks this Court to review the decision of the Tennessee Court of Appeals at Knoxville enforcing a written arbitration agreement that she signed. Pet. Apdx 1a-9a. She agreed to arbitration as a condition of receiving a short-term loan — the RAL — for which her anticipated federal income tax refund served as collateral. She later sued Block on various state law theories and demanded damages not to exceed $74,000. After the trial court denied Block's motion to compel arbitration, the Tennessee Court of Appeals granted an interlocutory appeal and reversed.

There is no dispute that this is a transaction in interstate commerce or that petitioner's substantive claims are within the scope of the arbitration clause. There is no dispute that petitioner signed the written contract containing the arbitration clause. Pet. Apdx 2a. The Tennessee Court of Appeals stated the question before it as, "whether the contract signed by the parties containing an arbitration agreement is enforceable." *Id.* at 1a.

The written agreement of the parties expressly required arbitration of "any claim or dispute (whether in contract, tort or otherwise) in any way relating to the Agreements or relating to the relationships of such parties *including the validity or enforceability of this arbitration provision* or any part thereof." *Id.* at 3a (emphasis added). Finding the case to be controlled by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, (the "FAA"), the court, citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), concluded: "Because the contract specifically states

that the parties agreed to arbitrate the question of the validity or enforceability of the arbitration agreement, and because the choice of law clause states that Federal law and Delaware law apply, the parties must submit the question of arbitration to arbitration." Pet. Apdx 8a. The Court of Appeals remanded to the trial court with directions to order arbitration as to the validity and enforcement of the arbitration clause.

The appellate court expressly relied upon the decision of the Tennessee Supreme Court in *Frizzell Construction Co. Inc. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79 (Tenn. 1999), *cert. denied*, 120 S.Ct. 2679 (2000), as its basis for applying the FAA as the controlling law. The court made no finding that any Tennessee statute was in conflict with the FAA, nor did it purport to restrict or expand upon the operation of the FAA. The Tennessee Supreme Court denied petitioner's request for further review without comment. Pet. Apdx 15a.

In seeking review in this Court, petitioner relies upon three manifest distortions of the record below. First, at page 6 of the petition, she claims that she "was unaware of the arbitration clause and was not informed of its existence." This factual claim is expressly refuted by the record and was rejected by the Tennessee Court of Appeals. Petitioner submitted her affidavit acknowledging her signature on the written agreement containing the arbitration clause. The arbitration clause was not buried in the document; it was segregated in its own, clearly labeled section, including an explicit statement in bold text that the parties, "*hereby waive their rights to litigate such claims in court*." Pet. Apdx 4a. Immediately above petitioner's signature, the agreement contains her representation that:

> **"I acknowledge that I have read, understand, and agree to . . . the disclosures above and on the reverse side of this Loan Application form including . . . Section 7 relating to arbitration."**

Likewise, immediately below petitioner's signature line was the following instruction in capital letters and bold print:

> **"DO NOT SIGN THIS LOAN APPLICATION UNTIL YOU HAVE READ THE IMPORTANT INFORMATION ABOVE AND ON THE REVERSE SIDE."**

Petitioner's claim that she never "agreed" to arbitrate is not based upon any objective manifestation of such disagreement but is nothing more than an attempted repudiation of her signature on the document. The Tennessee Court of Appeals found the existence of a written contract to arbitrate in accordance with the well-accepted rule that a party will not be permitted to disclaim her written declarations.

Second, petitioner's assertion that she has met her burden of producing evidence to support her unconscionability argument is totally baseless. She did not introduce any evidence in the Tennessee courts of what her costs would be if she proceeded in the forum selected by the agreement, the National Arbitration Forum (NAF). In the trial court, petitioner based her unconscionability arguments on her counsel's statement of the cost of proceeding under the American Arbitration Association Commercial Arbitration Rules and complained that in opposing arbitration she did not know what the NAF costs would be. (Opposition to Motion to Compel Arbitration at p. 1, n.3.) Petitioner's "evidence"

concerning the cost of proceedings before the National Arbitration Forum is nothing more than her counsel's speculation based upon the incomplete, and extra-record, excerpt from the NAF rules which are attached to her petition. Pet. Apdx 26a-37a.

Third, although petitioner bases much of her second argument upon the alleged unavailability of injunctive relief in an arbitration proceeding, her operative pleading contains no prayer for injunctive or declaratory relief. Pet. Apdx 5a. She did not attempt to add any claim for such relief until the days immediately preceding the hearing on the motion to compel arbitration. The trial court did not grant petitioner leave to add those claims. Pet. Apdx 11a-13a.

REASONS FOR DENYING THE PETITION

I. PETITIONER'S CONTENTION THAT ARBITRABILITY CANNOT BE DECIDED BY THE ARBITRATOR IS SQUARELY FORECLOSED BY *FIRST OPTIONS OF CHICAGO, INC. V. KAPLAN*, 514 U.S. 938 (1995).

The nub of petitioner's plea to this Court is based on the notion that she has an inalienable right under the FAA to have the issue of arbitrability decided by a Tennessee state court, rather than an arbitrator. That argument ignores the very terms of the arbitration agreement she signed, which plainly required her to arbitrate all claims relating to the agreement or the relationship of the parties "*including* the validity or enforceability of this arbitration provision or any part thereof."

As correctly observed by the Tennessee court, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943

(1995), specifically held that "the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." The *First Options* Court cited *AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 649 (1986), and *Steelworkers v. Warrior & Gulf Nav. Co.*, 383 U.S. 574, 583 n. 7 (1960), for the proposition that the "parties may agree to arbitrate arbitrability." Hence, in light of the contractual language, petitioner's invocation of the FAA to justify her claim to a judicial determination of arbitrability is spurious.

Nor can petitioner avoid her written obligations by arguing that she did not read the document and did not understand she was signing an arbitration agreement. The existence of an agreement to arbitrate is determined by application of "ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944. Petitioner's claim that her written agreement is subordinate to her subjective intent is a claim of unilateral mistake, a claim that is not legally sufficient to abrogate a signed contract under Tennessee law. *Bill Walker & Assoc., Inc. v. Parrish*, 770 S.W.2d 764, 770 (Tenn. App. 1989), *appeal denied*. The Tennessee court did not err in enforcing petitioner's signed contract to arbitrate "the validity or enforceability of this arbitration provision."

Wholly apart from the jurisdictional impediments to this petition, petitioner's FAA claim is directly at odds with controlling precedent from this Court.

II. THIS COURT SHOULD NOT REVIEW QUESTIONS OF TENNESSEE LAW THAT WERE NOT ADDRESSED BY THE COURT BELOW.

The petition's second and third Questions Presented both raise issues of Tennessee law that are not only unsuitable for review by this Court, but were not discussed in the opinion of the Tennessee Court of Appeals. This Court does not ordinarily grant review to consider issues not discussed by the court below. *Perry v. Thomas*, 482 U.S. 483, 492 (1987); *Street v. New York*, 394 U.S. 576, 582 (1969); *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945).

1. Even assuming that the alleged "conflict" between the FAA and the Tennessee Consumer Protection Act ("TCPA") was ruled *sub silento* below, such a ruling was entirely consistent with the decisions of this Court. Petitioner's claim that the FAA should yield because it is in "inherent conflict" with her rights as a "private attorney general" under the TCPA does not present an important question of unsettled law but in fact has consistently been rejected by this Court.

This Court has acknowledged a hypothetical possibility (yet to be found to exist) that *Congress* could create a statutory cause of action that was in such inherent conflict with the FAA that the FAA must yield. *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-29 (1991) Petitioner's "private attorney general" argument against arbitration exists only as a subspecies of this "inherent conflict" theory. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 239-42 (1987).

Petitioner's attempt to construct a conflict between the TCPA and the FAA collides headlong with, and loses

to, the Supremacy Clause of the United States Constitution. The FAA does not yield to inconsistent state statutes, even those which explicitly purport to forbid arbitration of claims arising under the state remedial program. In *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), this Court addressed a California franchisee protection statute that contained a broad anti-waiver provision similar to the TCPA's. This Court held that the Supremacy Clause forbids application of the anti-waiver provision to void an arbitration agreement governed by the FAA. *Id.* at 16. *See also Perry v. Thomas*, 482 U.S. at 490-91 (striking down a later California statute which specifically prohibited arbitration). This Court rejected a request to overturn *Southland* in *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 272 (1995).

Petitioner's related argument that she can avoid arbitration because she seeks declaratory and injunctive relief suffers the same fate because it is based upon an imagined shortcoming in the fundamental nature of arbitration. *Perry v. Thomas*, 482 U.S. at 492, n. 9. Even so, the argument is based upon two false premises. First, there is nothing in agreement which prevents the award of such relief. *Gilmer*, 500 U.S. at 20. Second, petitioner's operative pleading contains no prayer for injunctive or declaratory relief. Pet. Apdx 5a.

Even had petitioner established the existence of a true conflict, her claim that the FAA must yield to the TCPA is contrary to well-settled law and provides no basis for review by this Court.

2. Petitioner's third Question Presented raises the issue of "unconscionability" under "applicable Tennessee law" (Pet. at i). Again, this is a state law question

neither addressed nor decided by the Tennessee Court of Appeals. As such, it does not meet any of the requirements for review by this Court.

Petitioner's "unconscionability" argument is likewise devoid of merit. Her assertion that the "prohibitive cost" of arbitration would pose an insuperable obstacle has no basis in the record. The arbitration rules attached in Appendix E to her petition were not admitted into evidence in the lower courts and, moreover, are incomplete in that they omit provisions which would permit her to shift costs or avoid them altogether. As in *Green Tree Financial*, petitioner's argument based on the costs of arbitration is utterly speculative. 121 S.Ct. at 522.

Petitioner's complaints that she will be precluded from her state-law class action rights and trial by jury are also insufficient to overcome her agreement to arbitrate. This Court has ruled both issues in the federal context in *Gilmer*, 500 U.S. at 32, and has observed otherwise that the right to a jury trial is waivable. *See Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-49 (1986). Indeed, every agreement to arbitrate by definition waives the right to a jury.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BRYAN CAVE LLP

N. Louise Ellingsworth,
(Counsel of record)
Daniel R. Young
1200 Main Street, Suite 3500
Kansas City, MO 64105-2100
(816) 374-3200

Thomas C. Walsh,
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102-2750

**BAKER, DONELSON,
BEARMAN & CALDWELL**
Gary C. Shockley
1000 Commerce Center
211 Commerce Street
Nashville, TN 37201
(615) 726-5600

March 2001